

FILED

Clerk

District Court

MAR 30 2006

For The Northern Mariana Islands

By

(Deputy Clerk)

1 ERIC S. SMITH, Bar No. F 0157
2 SMITH & WILLIAMS
3 Attorneys at Law
4 P.O. Box 5133 CHRB
Saipan MP 96950
Tel: 233-3334
Fax: 233-3336

5 Attorneys for Plaintiff

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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE
NORTHERN MARIANA ISLANDS

10
11 ALAN STUART MARKOFF, D.D.S.dba
TOOTHWORKS and OPEN CHOICE,

12 Plaintiff,

13 vs.

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15 TODD KEITH JOHNSON, D.D.S.

16 Defendant.

CIVIL ACTION NO. CV-05-0035

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**DECLARATION OF
ERIC S. SMITH
IN SUPPORT OF
PLAINTIFF'S OPPOSITION TO
MOTION TO STAY**

Date: April 13, 2006
Time: 9:00 a.m.

I, ERIC S. SMITH, declare under penalty of perjury as follows:

1. I am one of the attorneys for Dr. Alan S. Markoff in the above captioned matter.
2. On or about February 10, 2005, Smith & Williams was retained by Dr. Alan Stuart Markoff to represent him in his claims against Dr. Todd K. Johnson, for a material breach of an Agreement for the Purchase and Sale of a Dental Practice ("Agreement"), executed by him and Dr. Johnson on September 15, 2004.
3. On or about April 15, 2005, we sent a letter to Dr. Johnson informing him of Dr. Markoff's claims, stating among other things, that the contents of the financial information he provided to Dr. Markoff for the sale of the dental clinic did not correctly reflect the financial affairs of the business. A true and correct copy of the

1 letter is attached hereto as Exhibit "1."

2 4. The letter was sent to Dr. Johnson via certified mail with a return receipt request at
3 his address stated in the Agreement, which is c/o Dee Johnson, 13901 N.E. 8th ,
4 Choctaw, Oklahoma 73020.

5 5. On or about May 6, 2005, after not hearing from Dr. Johnson, we sent the letter to
6 Dr. Johnson's email address at todd@johnsonpools.net. This email address was
7 provided by Dr. Johnson to Plaintiff. A true and correct copy of the email is attached
8 hereto as Exhibit "2."

9 6. On or about May 20, 2005, the letter which was sent via certified mail to Dr. Johnson
10 returned with a stamp "Unclaimed" by the U.S. Postal Services. A true correct copy
11 of the envelope containing the letter is attached hereto as Exhibit "3."

12 7. On or about May 23, 2005, Plaintiff received a response from Dr. Johnson via email.
13 A true and correct copy of the email is attached hereto as Exhibit "4."

14 8. Dr. Johnson has not communicated with Smith & Williams directly regarding this
15 matter.

16 9. After May 23, 2005, Plaintiff did not receive any word from Dr. Johnson.

17 10. Sometime in September 2005, Dr. Markoff informed us that his accountant in Texas
18 found a listing in The Houston Business Journal September 2005 edition that Dr.
19 Johnson filed a lawsuit against him.

20 11. Plaintiff was in Houston from September 28, 2005 to October 20, 2005 but he was
21 not served with the complaint.

22 12. On or about November 4, 2005, Plaintiff decided to file a complaint against Dr.
23 Johnson in the U.S. District Court in Saipan.

24 13. On December 6, 2005, Dr. Johnson was served with the Summons and Complaint in
25 Oklahoma City. A true and correct copy of the Affidavit of Service is attached hereto
26 as Exhibit "5."

1 14. On or about January 6, 2005, David Banes, who was retained as legal counsel for Dr.
2 Johnson, called our office to request for an extension to file a response to the
3 complaint, which was due on December 26, 2005.

4 15. In the spirit of cooperation, and in an attempt to negotiate a settlement before time
5 and effort was expended on discovery and motions in the early stages of litigation,
6 we consented to Mr. Banes' request and agreed that his response would be due on
7 January 16, 2006. A true and correct copy of a stipulation reflecting the new date is
8 attached hereto as Exhibit "6."

9 16. On January 16, 2006, Mr. Banes called to let us know that he was filing a motion to
10 strike Plaintiff's fraud allegation. He filed the motion on January 17, 2006 - one day
11 late.

12 17. After the Court's decision was issued permitting Plaintiff a week to file an amended
13 complaint, Plaintiff filed an amended complaint on February 24, 2006.

14 18. Defendant's answer was due on March 16, 2006 but he filed it on March 20, 2006 -
15 four days late.

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17 I declare under penalty of perjury that the foregoing is true and correct and
18 that this Declaration was executed on March 30, 2006, at Garapan, Saipan,
19 Commonwealth of the Northern Mariana Islands.

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ERIC S. SMITH
Declarant

SMITH & WILLIAMS

Attorneys-At-Law
P.O. Box 5133 CHRB
Saipan MP 96950

Tel. Nos. (1-670) 233-3334/5 Fax No. (1-670) 233-3336

eric.s.smith@saipan.com
markwilliams@saipan.com

April 15, 2005

Dr. Todd Keith Johnson, D.D.S.
c/o Dee Johnson
13901 N.E. 8th
Choctaw, Oklahoma 73020

Re: *Purchase of Toothworks and Openchoice Dental Practice*

Dear Dr. Johnson,

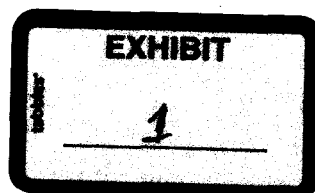
I represent Dr. Alan Markoff.

When you and Dr. Markoff were discussing the sale and purchase of your proprietary business – Toothworks and Openchoice – you provided Dr. Markoff with a history of the deposits made by customers into the two business accounts that you had set up for Toothworks and Openchoice. Based on that documentation and statement made by you to Dr. Markoff, he was lead to believe the documents were accurate and that they reflected the deposits that clients made to the businesses.

Dr. Markoff executed the agreement for the purchase and sale of the dental practice in large part due to his reliance upon the accuracy of the amount of deposits made and your representations that the deposits made into the two accounts reflected the cash flow made by patients and customers of Toothworks and Openchoice.

Dr. Markoff has since learned that the statements made were false and the documents provided did not accurately reflect the deposits made by patients and customers. The amount stated in the consolidated deposits over stated the deposits by at least 25%. As a result of the over statement the true revenue deposits was at least 25% less than represented and the value of the business was equally reduced.

In the written Agreement for the Purchase and Sale of A Dental Practice, executed by you on September 15, 2004, you warranted that the financial information provided to Dr. Markoff was correctly and properly prepared in accordance with generally accepted accounting principles and that the contents of financial information correctly reflected and fairly presented the financial affairs of the business. Through the examination of your records by an accountant, Dr. Markoff has learned



SENT VIA CERT MAIL
4/15/05

Letter to Todd Johnson
April 15, 2005
Page 2

that accepted accounting principles were not followed and that the contents of the financial information did not correctly reflect the financial affairs of the business.

Based upon the foregoing, I am of the opinion that you are in material breach of the Agreement for the Purchase and Sale of a Dental Practice and that you are in violation of the CNMI Consumer Protection Act. A violation of that Act carries with it penalties which include double actual damages and an award of attorney fees.


Dr. Markoff wishes to resolve this matter quickly and through an agreement with you. It is my understanding that under the Agreement, the total purchase price has not been made and that approximately 25% of the purchase price remains outstanding. Dr. Markoff has authorized me to offer to settle this matter at this stage by entering into an amendment of the Agreement with you that the funds you have theretofore received represent the total purchase price of the business. So that we may resolve this matter as soon as possible, please respond to me within 30 days from the date of this letter.

I look forward from hearing from you.

Sincerely,

SMITH & WILLIAMS

By:



ERIC S. SMITH
Attorney at Law

Eric Smith

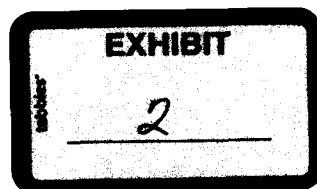
From: "Eric Smith" <eric.s.smith@saipan.com>
To: "Todd Johnson" <todd@johnsonpools.net>
Cc: "Alan Markoff" <asm24@sbcglobal.net>
Sent: Friday, May 06, 2005 9:19 AM
Attach: Letter to Todd Johnson final draft.wpd
Subject: Toothworks sale and purchase

Dear Dr. Johnson,

I am attaching a letter that was sent by US certified mail to the Oklahoma address found in the agreement between you and Dr. Markoff for the purchase and sale of Toothworks and Openchoice. As stated in the letter Dr. Markoff has authorized me to offer to settle this matter at this stage by entering into an amendment of the Agreement with you that the funds you have theretofore received represent the total purchase price of the business. Please give me a call.

Sincerely,

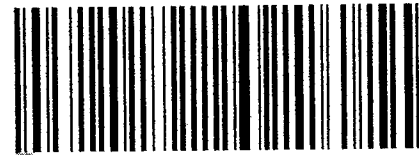
ERIC S. SMITH
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SMITH & WILLIAMS
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Saipan MP 96950
Tel. No. (670) 233-3334
Fax No. (670) 233-3336



SMITH & WILLIAMS

Attorneys At Law
Former *Mai Thai* Building
P.O. Box 5133 CHRB
Satpan MP 96950

CERTIFIED MAIL



7001 2510 0001 9600 2974

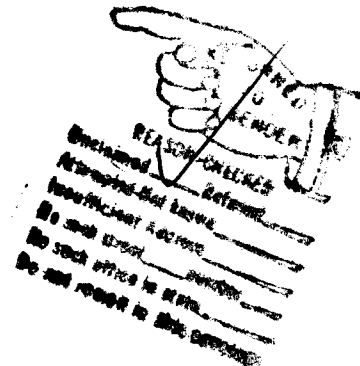


U.S. POSTAGE
PAID
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APR 19, 05
AMOUNT

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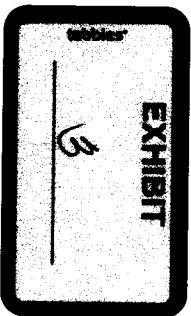
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~~Dr. Todd Keith Johnson, D.D.S.
c/o Dee Johnson
13901 N.E. 11th
Choctaw, Oklahoma 73020~~



4-25

4/25/05
4/30/05
Return 5/10/05



Eric Smith

From: "Todd" <Todd@johnsonpools.net>
To: "Allan Markoff" <asm24@sbcglobal.net>
Cc: "Eric Smith" <eric.s.smith@saipan.com>
Sent: Monday, May 23, 2005 11:04 PM
Attach: image001.png

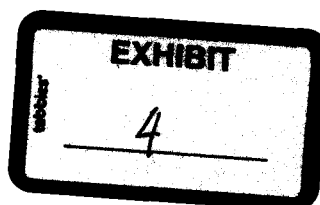
Alan

I'm confused. You took over a year, had two or three banks, the SBA and your personal accountant review all the financial data prior to closing. Now you claim the data is not accurate. You appear to be one of those people for whom negotiation of the deal never ends - even after closing. However, giving you the benefit of the doubt, I invite you to provide me details of the financial data you now suggest is inaccurate.

Todd Johnson



1041 NW 71st Place • Oklahoma City, OK 73116 • Phone: 405-840-2291
FAX: 405-286-3718 • admin@johnsonpools.net • Toll Free: 866-347-5568



5/26/05

COPY of
Original Filed
on this dateUNITED STATES DISTRICT COURT
NORTHERN District of MARIANA ISLANDS

JAN - 2 2006

Case Number: CV-2005-0035

Clerk
District Court
for The Northern Mariana Islands

Plaintiffs:

**ALAN STUART MARKOFF, D.D.S dba TOOTHWORDS AND
OPEN CHOICE**

vs.

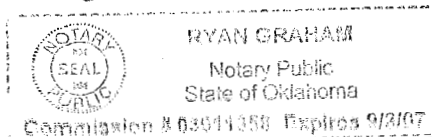
Defendant:

TODD KEITH JOHNSON, D.D.S

For:

SMITH & WILLIAMS ATTORNEYS AT LAW
P.O. Box 5133 Chrb
Saipan, MP 96950Received by Xtreme Process Service on the 15th day of November, 2005 at 1:06 pm to be served
on **TODD KEITH JOHNSON 13901 N.E. 8TH ST. CHOCTAW, OKLAHOMA.**I, Kenneth R. Andrews, being duly sworn, depose and say that on the **6th day of December, 2005**
at **8:19 pm, I:****Personally Served** the within named person(s) with a true copy of this **SUMMONS IN A CIVIL
CASE, COMPLAINT AND DEMAN FOR JURY TRIAL, MISC. EXHIBITS** in OKLAHOMA COUNTY,
with the date and hour endorsed thereon by me, pursuant to State Statutes.The undersigned, of lawful age, the person named as Licensed Private Process Server for the
foregoing County and State, Being first duly sworn upon oath states that the foregoing is true and
correct.Subscribed and Sworn to before me on the
21st day of December, 2005 by the affiant who
is personally known to me.

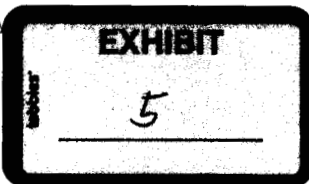
NOTARY PUBLIC

**Kenneth R. Andrews**
PSS-05-10 CLEVELAND COUNTY**Xtreme Process Service**
9301 S. Sunnyslane Rd.
Oklahoma City, OK 73160
(405) 793-7338

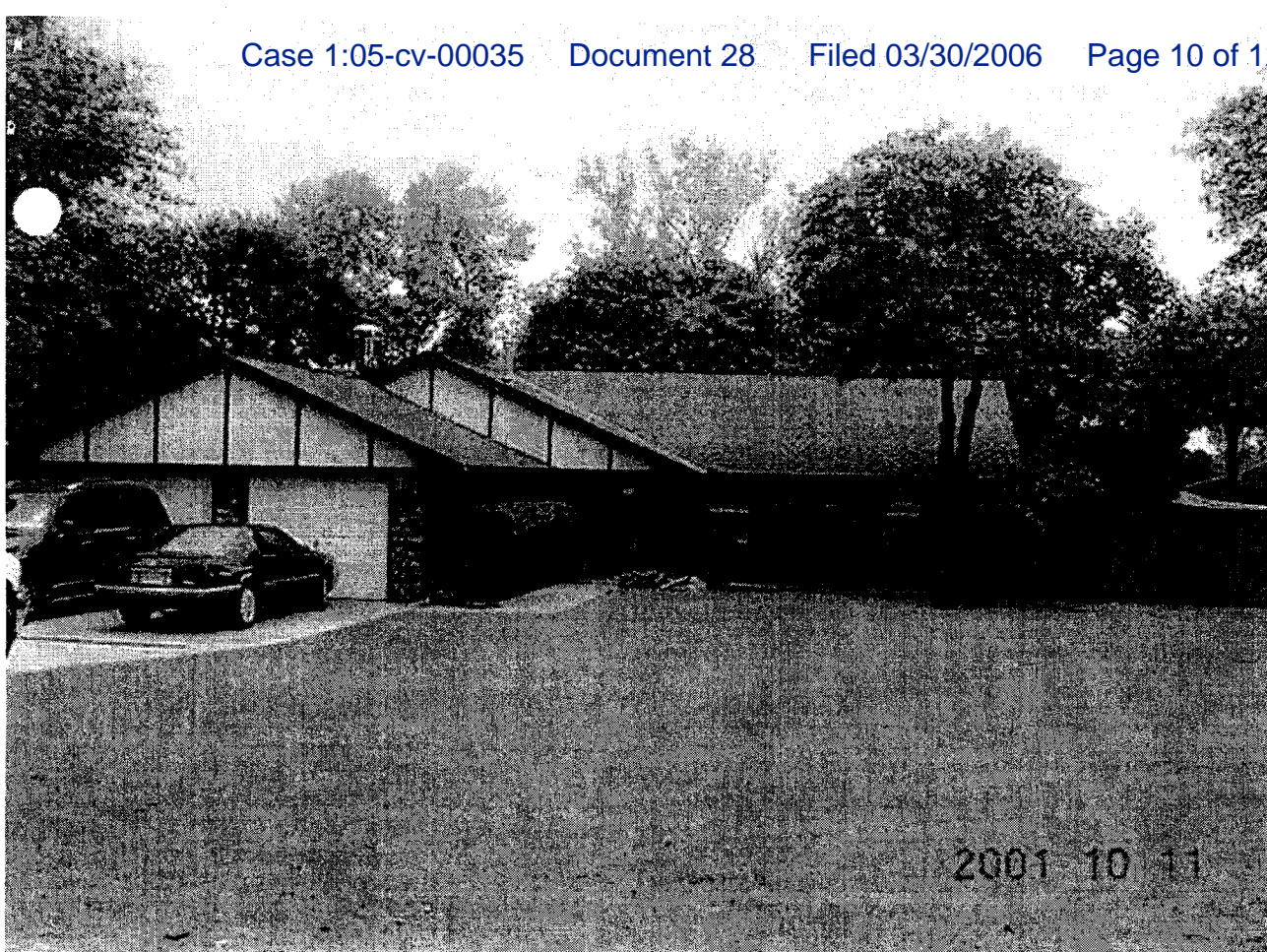
Our Job Serial Number: 2005000087

Service Fee: \$150.00

Copy



- Process Server's Toolbox V5.5i



FILED
Clerk
District Court

JAN - 9 2006

For The Northern Mariana Islands
By _____
(Deputy Clerk)

1 DAVID G. BANES, Esq.
2 O'Connor Berman Dotts & Banes
3 Second Floor, Nauru Building
4 P.O. Box 501969
5 Saipan, MP96950
6 Telephone No. (670) 234-5684
7 Facsimile No. (670) 234-5683

8 Attorneys for Defendant Todd Keith Johnson

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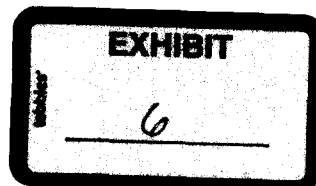
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

| | |
|-----------------------------------|-----------------------------|
| ALAN STUART MARKOFF, D.D.S. dba) | CIVIL ACTION NO. CV-05-0035 |
| TOOTHWORKS and OPEN CHOICE,) | |
| Plaintiff,) | STIPULATION AND ORDER |
| vs.) | |
| TODD KEITH JOHNSON, D.D.S.,) | |
| Defendant.) | |

COMES NOW Plaintiff and Defendant, by and through counsel, agree and stipulate as follows:


Defendant Todd Keith Johnson shall have until January 16, 2006 to file his Response to Plaintiff Alan Stuart Markoff's Complaint.

SO STIPULATED.

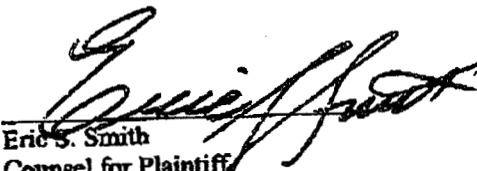


01/06/2006 13:18 FAX

1 Dated: July 6th


David G. Bancs
Counsel for Defendant
Todd Keith Johnson

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5 Dated: January 6, 2006


Eric S. Smith
Counsel for Plaintiff
Alan Stuart Markoff

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10 **ORDER**

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12 Having considered the agreement of the parties, and good cause shown, Defendant Todd
13 Keith Johnson SHALL/SHALL NOT have until January 16, 2006 to file his Response to
14 Plaintiff Alan Stuart Markoff's Complaint.

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17 SO ORDERED: JAN - 9 2006

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22 Alex R. Munson, Chief Judge
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